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IN THE

Supreme Court of the United States

October Term, 1964

No. 613

ADAM CLAYTON POWELL, JR.,

Petitioner,

v.

ESTHER JAMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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LOUIS APPELL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WO 2-0620

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Esther James, by her attorney Raymond Rubin, Esq., respectfully opposes the petition that a Writ of Certiorari be issued to review the mandate of the Court of Appeals of New York entered on July 10, 1964.

Opinions Below

The *per curiam* opinion of the Court of Appeals is to be found in the appendix to the petition herein. This is the final judgment in the State of New York, where judgment was entered for the plaintiff, affirming the judgment

of the Appellate Division of the Supreme Court, First Judicial Department, which rendered a memorandum decision for a new trial unless the plaintiff agreed to a reduction of the jury's verdict to $11,500.00 as compensatory damages and $35,000.00 as punitive damages.

Question Presented

Did the Court of Appeals of New York err in affirming the jury's verdict that the defendant's libelous remarks concerning the plaintiff were made recklessly, wantonly and with indifference and in disregard of plaintiff's rights and as a result thereof not privileged.

Statement of Facts

On March 6, 1960, Adam Clayton Powell, Jr., a United States Congressman representing the Sixteenth Congressional District of New York, in the course of a commercial program sponsored by Associated Food Stores Cooperative, Inc. which was being telecast over TV Station WNTA (Channel 13) owned by NTA Television Broadcasting Corp., named the respondent Esther James as a "bag woman for the Police Department" (fols. 100 and 263) after referring to the Mafia and other criminals of the worst order (fols. 93-94 and 258). He further boasted that the Congressional Record was a "dog-gone pulpit" from which to make accusations "without any fear of suits of libel" (fols. 91-92, 255-256), forgetting that he was on television and not immune at said time. The petitioner also stated that he had given the said information concerning those alleged criminals to former Police Commissioner Kennedy of New York City but that Commissioner Kennedy was not telling the truth when he (Com-

missioner Kennedy) had denied that he had received said information (fols. 96-98, 261). The petitioner further stated that "said Esther James is still walking Washington Heights collecting money—she'll be doing it tomorrow" (fols. 99-100, 265).

Great publicity was given to this telecast of "Between the Lines" by means of newspaper advertisements (fol. 279), and by circulars given out at the many stores of the sponsor in the greater New York area, as well as by signs appearing on the windows of said stores (fols. 280-283), resulting in same being witnessed by about 320,000 viewers (fol. 247).

The record shows that following the television program as aforementioned, the respondent Esther James was spit upon (fols. 210, 598), was called obscene names (fols. 208-209, 228, 231), was threatened to such an extent that she was compelled to go over the roof of the next building in order to reach the street (fols. 355, 373-374), was shunned by her fellow church members and general society (fols. 211, 216-217, 598), and caused to be in actual fear of her life.

The record further shows that the jury found that the remarks were either made in bad faith and with malice or ill will towards Mrs. James or made recklessly and with indifference and without regard for her rights; or that the maker knew or should have known that the information which he had received concerning her was unreliable and notwithstanding the same he used it (fols. 1063-1064). The Trial Court ruled that the remarks were privileged if it were not for the foregoing (fols. 1060-1062).

The maker of said remarks—Adam Clayton Powell, Jr. —is a member of the United States Congress, Chairman of the House Committee on Labor and Education, Minis-

ter of the Abyssinian Baptist Church, the largest church in Harlem, and a person whose word has long been accepted in Harlem as the "gospel truth".

The respondent, however, is a widow who was 63 years of age at the time of the telecast, employed as a domestic, and a church going woman of excellent reputation. Her only criminal conviction occurred about 20 years before arising out of a dispute with her next door neighbor in Buffalo where she had then resided. Said neighbor had refused to permit the respondent's then five year old son to pull his kiddy-cart over the sidewalk in front of the neighbor's home but insisted upon the child going into the gutter (fol. 389). As a result, a fight ensued and the respondent was fined $10.00 (fol. 394).

The respondent was a person of good reputation known by her previous employer as well as by other members of her community to be a good woman and a person not only of whom nothing bad was said or known, but in addition whose public spirited acts were such as to be officially recorded in the records of the Police Department of the City of New York (fols. 330-334).

The Court of Appeals of New York affirmed the judgment in favor of respondent on July 10, 1964. Judgment of Affirmance was entered in the Office of the Clerk of New York County on July 20, 1964, and service of a copy thereof with notice of entry was duly served upon Mr. Powell's attorneys on July 20, 1964. The petition for the herein Writ was filed on October 23, 1964. No order has ever been made for an extension of time within which to file the same.

REASONS FOR DENYING THE WRIT

I

The writ is untimely.

The Order of Affirmance by the Court of Appeals was issued on July 10, 1964. The Judgment of Affirmance was entered in the Office of the Clerk of the County of New York on July 20, 1964, and a copy of same with notice of entry thereof was duly served on July 20, 1964 (Appendix).

The petition for the herein writ was filed on October 23, 1964, more than ninety days since the entry of judgment, and the period within which to apply for a writ has not been extended by a Justice of this Court.

Therefore it appears that petitioner's application for a Writ of Certiorari is out of time and should be denied because it was not filed within the required ninety day period.

USCA Title 28 Sec| 2101 (c);
Rule 22 (1) of this Court;
Department of Banking v. *Pink*, 317 U. S. 264.

II

All libelous utterances are not within the area of constitutionally protected free speech.

The petitioner contends that the judgment is repugnant to the First and the Fourteenth Amendments of the United States Constitution because it allegedly restricts his freedom of expression.

If one were to consider the petitioner's contention that his remarks were privileged as a matter of law then any legislator would have the legal right to appear on any commercial television program and falsely accuse any private citizen of having committed the most infamous crimes. To give effect to said argument would be to sanction libel and rabble rousing of the worst sort.

To sanction rabble rousing, to permit the making of wild and false accusations and similar tactics by persons who are elected to the Legislature, just because they are elected to the Legislature, and without holding them in check would result in utter chaos.

There have been enough wrongs already committed under the present guise of "Congressional Immunity". To open the door wider to wrongs that cannot be righted, would be most harmful to all Americans. Monetary damages alone cannot remedy all the results of the evils so committed.

It is the duty of the Courts to protect the common citizen from any attempt to deprive him of one of his most valuable possessions—the right to go about in public with a good name—a possession that should be zealously guarded.

If ever there were an attempt to undermine the basic facets of society by giving people in public office the right to publicly defame, without rhyme or reason, the good name and practically only possession of a common citizen, this is the attempt. This attempt should be stopped now before others try to do the same.

This Court on numerous occasions has so held. *Roth* v. *U. S.*, 354 U. S. 476, 483; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266.

It was only because the petitioner's libelous remarks were either made in bad faith or made recklessly and with indifference and without regard for the respondent's rights that the jury found that Mr. Powell had forfeited his privilege, if any (fols. 1060-1064).

The recklessness and wanton indifference on the part of the petitioner in making the telecast charges are reflected by the complete absence of any proper investigation of the charges before the petitioner made his libelous calumny.

This fact was demonstrated to the jury in the person and by the testimony of the alleged investigator. The fact is that no investigation was conducted and if there had been one, it would have established that the respondent was a public spirited citizen, active in combating these criminals. But the petitioner knowing that no investigation had been conducted and in complete disregard of respondent's right as a citizen to preserve her own good name, telecast to hundreds of thousands of viewers the charge that the respondent was a criminal of the lowest order, living on the fruits of her crimes.

It would be difficult to imagine a more heinous case of recklessness than that manifested here.

For the foregoing reasons the libelous remarks were not privileged.

III

The cases cited by petitioners are not in point.

The *New York Times Co.* v. *Sullivan* case cited on pages 6 and 7 of petitioner's Writ refers to an action brought by a public official and this Court held therein that the official conduct of a public official may be subject to a

libelous attack with immunity but did not hold that a public official may make a libelous attack upon a private citizen with immunity.

The *United States* v. *Johnson* case cited on page 8 of the Writ and the *Tenney* v. *Brandhove* and *Cochran* v. *Cousens* cases cited on page 9 refer to statements made by legislators, either on the floor of the Legislature, officially or unofficially, or in committee, or by way of resolution or by an act of voting or by insertion in the printed record. The privilege referred to in the cases cited cannot be stretched to embrace a commercially sponsored television program.

In fact this Court in the *Tenney* case *supra*, held:

> "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role."

once again sustaining the reasoning contained in *Long* v. *Ansell*, 69 F. 2d 386, 389.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND BURR,
Attorney for Respondent.

Dated: New York, November 6, 1964

APPENDIX

Affidavit of Service of Judgment of Affirmance

State of New York
City of New York } ss.:
County of New York

RAYMOND RUBIN, being duly sworn, deposes and says that he is the attorney for the above named plaintiff herein. That on the 20 day of July, 1964 he served the within Judgment of Affirmance with notice of Entry upon Chance and Mitchell, the attorneys for the above named defendant by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Mail Chute—Official Depository maintained and exclusively controlled by the United States at 291 Broadway, New York City, directed to said attorneys for the defendant at No. 225 Broadway, New York, N. Y. that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

RAYMOND RUBIN

Sworn to before me this
20th day of July, 1964

GEORGE J. HAMMERMAN
Notary Public
State of New York
No. 41-1654450
Qualified in Queens Co.
Commission Expires March 30, 1965